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02
03 UNITED STATES DISTRICT COURT
04 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

05 JAMES H. CARNER, III,

06 Plaintiff,

07 v.

08 DR. BEN SANDERS,

09 Defendant.
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) CASE NO. C07-1646-JLR
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) REPORT AND RECOMMENDATION
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11 INTRODUCTION

12 This is a *pro se* civil rights action under 42 U.S.C. § 1983. Plaintiff is a state prisoner who
13 was formerly confined in the King County Jail in Seattle and Kent, Washington (“Jail”). He
14 alleges that Dr. Ben Sanders, Medical Director of the Jail, denied him interferon treatment for
15 plaintiff’s hepatitis C infection in violation of his constitutional rights. Plaintiff seeks declaratory
16 relief, monetary damages, and injunctive relief in the form of the treatment he believes is necessary
17 for his hepatitis C infection.¹ Defendant Dr. Sanders has filed a motion for summary judgment
18 (Dkt. No. 33), to which plaintiff has filed a response (Dkt. No. 42). The Court, having considered
19 the briefs of the parties, concludes that defendant’s motion for summary judgment should be
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21 ¹ Plaintiff is currently incarcerated in the Washington State Penitentiary in Walla Walla,
22 Washington and it is unclear from the record whether he is presently receiving interferon
treatment.

01 granted and that plaintiff's complaint, and this action, should be dismissed with prejudice.

02 FACTS

03 The essential facts underlying this lawsuit are undisputed. Except for brief periods totaling
04 approximately three months, plaintiff was confined in either the King County Jail in Seattle or the
05 Regional Justice Center in Kent, Washington, for two years, from May 2006 until May 2008.
06 (Dkt. No. 34 at 2). During those two years, plaintiff frequently sought medical care from Jail
07 officials to address two concerns: hepatitis C and a skin rash. (Dkt. No. 36 at 2-6). In reviewing
08 the declaration submitted by Dr. Charissa Fotinos, Chief Medical Officer for King County
09 Department of Public Health, on behalf of defendant, the Court counts approximately 19 times that
10 plaintiff complained of ailments and was seen by Jail medical staff. (*Id.*)

11 According to Dr. Fotinos, approximately 15% to 25 % of people infected with hepatitis
12 C spontaneously recover. (*Id.* at 6). Of those who do not recover, only 10% to 20% develop
13 advanced scarring of the liver, also known as cirrhosis. (*Id.* at 6-7). Cirrhosis takes 20-30 years
14 to develop. (*Id.*) Approximately 75% of people with hepatitis C show minimal or no symptoms
15 until they reach the level of cirrhosis. (*Id.* at 7).

16 Interferon and ribavirin are the only drugs approved for use against hepatitis C. (*Id.*)
17 Interferon is administered by three injections a week for 6 to 12 months. However, interferon is
18 not recommended for all patients with hepatitis C. Contraindications include alcohol abuse, which
19 plaintiff admitted on several occasions when he was booked into the Jail. (Dkt. No. 36 at ¶¶ 3,
20 15). The effectiveness of interferon treatment varies. Dr. Fotinos asserts that "[t]here is currently
21 no good evidence that treatment results in decreased mortality from [hepatitis C] infection or its
22 complications." (*Id.* at 8).

01 Plaintiff repeatedly sought interferon treatment from Jail officials for his hepatitis C
02 condition. As a matter of policy, the Jail does not initiate interferon treatment for several reasons.
03 First, standard interferon treatment lasts 48 weeks, which is longer than the average stay at the Jail
04 for most inmates. (Dkt. No. 36 at 8). Second, drug or alcohol abuse, which is common among
05 inmates, is a contraindication to interferon treatment. (*Id.* at 9). Third, inmates may lack access
06 to health care upon release and be unable to continue the treatment. Fourth, there is apparently
07 little funding available even for those inmates who are good candidates for the treatment. (*Id.*)

08 For these policy reasons, the Jail denied plaintiff interferon treatment. Instead, the Jail
09 offered plaintiff “clinical follow-up,” which includes “examination by clinicians, blood tests, and
10 imaging tests as indicated, with special attention to signs of acute disease or decompensation of
11 chronic disease.” (*Id.*) In September 2006, plaintiff had two blood tests to measure the levels of
12 enzymes in his liver which can be a sign of liver damage. (Dkt. No. 34 at 3). Dr. Fotinos
13 concedes that one of the results is consistent with chronic hepatitis, but does not state whether this
14 result is also a sign of liver damage. (*Id.* at 4).

15 Plaintiff also received medical care numerous times for his rash. Dr. Fotinos states that
16 plaintiff actually has suffered from three separate rashes, one of which, called “lichen planus,” may
17 be associated with hepatitis C. (*Id.* at 6). However, only a skin biopsy can confirm the link and
18 one has not been performed. In addition, interferon treatment may not alleviate the rash. (*Id.*;
19 Dkt. No. 46 at 2).

20 On October 10, 2007, plaintiff submitted a proposed civil rights complaint to the Court
21 pursuant to 42 U.S.C. §1983. (Dkt. No. 1). The Court found the complaint deficient and granted
22 plaintiff leave to amend. (Dkt. No. 10). Plaintiff filed an amended complaint on November 27,

01 2007. (Dkt. No. 13). Defendant filed an answer on March 12, 2008, followed by a motion for
02 summary judgment on June 16, 2008. (Dkt. No. 33). Plaintiff sought an extension of time to file
03 a response, which the Court granted on August 4, 2008. (Dkt. No. 39). Plaintiff filed a response
04 on August 13, 2008. (Dkt. No. 42). Defendant filed a reply on August 29, 2008 and the matter
05 is ready for review.

06 DISCUSSION

07 Summary judgment is appropriate when, viewing the evidence in the light most favorable
08 to the nonmoving party, there exists “no genuine issue as to any material fact” such that “the
09 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A material fact
10 is a fact relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477
11 U.S. 242, 248 (1986). Genuine issues of material fact are those for which the evidence is such that
12 “a reasonable jury could return a verdict for the nonmoving party.” *Id.*

13 In response to a properly supported summary judgment motion, the nonmoving party may
14 not rest upon mere allegations or denials in the pleadings, but must set forth specific facts
15 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the
16 existence of the elements essential to his case. *See Fed. R. Civ. P. 56(e)*. A mere scintilla of
17 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252.

18 Plaintiff alleges in his § 1983 civil rights complaint that defendant violated his rights under
19 the Eighth Amendment by denying him interferon treatment for hepatitis C. ² Section 1983

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21 ² Plaintiff was a pretrial detainee at the Jail until the state court entered a judgment against
22 him on August 18, 2006. (Dkt. No. 33 at 8, n.1). Therefore, technically, his claim is based upon
the Due Process Clause for the period from May 11, 2006 until August 18, 2006. *See Carnell v.*
Grimm, 74 F.3d 977, 979 (9th Cir. 1996). However, the same standard of “deliberate

01 requires a claimant to prove (1) that a person acting under color of state law (2) committed an act
02 that deprived the claimant of some right, privilege, or immunity protected by the Constitution or
03 laws of the United States. *See Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). There is
04 no dispute here that defendant acted under color of state law. The sole issue is whether
05 defendant's conduct deprived plaintiff of a federally protected right.

06 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions
07 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that
08 inmates receive adequate medical care. *Id.* In order to establish an Eighth Amendment violation,
09 a prisoner must satisfy a two-part test containing both an objective and a subjective component.
10 The Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively
11 "harmful enough" to establish a constitutional violation; and (2) the prison official acted with a
12 sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. at 834. The objective
13 component of an Eighth Amendment claim is "contextual and responsive to 'contemporary
14 standards of decency'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Estelle v. Gamble*,
15 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective component of the
16 Eighth Amendment standard has been defined as "deliberate indifference" to an inmate's health or
17 safety. *Farmer v. Brennan*, 511 U.S. at 834.

18 Plaintiff fails to meet either prong of the Eighth Amendment test. First, plaintiff simply
19 offers no evidence to establish that defendant's alleged wrongdoing was objectively harmful
20 enough to establish a constitutional violation. For example, he does not offer any evidence that
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22 indifference" applies. *See Johnson v. Meltzer*, 134 F.3d 1393, 1398 (9th Cir. 1998).

01 he falls into the small category of patients with hepatitis C who suffer from cirrhosis of the liver.
02 In his response, plaintiff cites his skin rash, or “physical scarring,” as evidence of harm caused by
03 his condition. (Dkt. No. 42 at 2). However, he does not offer any probative evidence of the link
04 between his rash and hepatitis C, and defendant points out that this link is tenuous. (Dkt. No. 46
05 at 2).

06 In addition, plaintiff does not satisfy the subjective component of the Eighth Amendment
07 test. The record is devoid of any evidence that defendant demonstrated deliberate indifference to
08 plaintiff’s serious medical needs. As noted above, the record establishes that plaintiff was seen
09 approximately 19 times by Jail medical staff over a two-year period. Plaintiff’s disagreement with
10 defendant over the proper course of treatment for his condition does not amount to a
11 constitutional violation. A mere difference of opinion as to which medically acceptable course of
12 treatment should be followed does not establish deliberate indifference. *See Sanchez v. Vild*, 891
13 F.2d 240, 242 (9th Cir. 1989). Indeed, this Court has held that a difference of opinion between
14 doctors on whether interferon treatment is advisable does not establish an Eighth Amendment
15 violation. *See Boyd v. Stern*, Case No. C06-360-MJP (W.D. Wash., Order entered May 2, 2007
16 at 2-3); *see also Fleming v. LeFevere*, 423 F. Supp.2d 1064, 1070 (C.D. Cal. 2006) (a prisoner’s
17 own opinion that he should receive interferon treatment for hepatitis C, without more, does not
18 create a triable issue of fact).

19 In sum, as plaintiff fails to demonstrate that the alleged wrongdoing was objectively
20 harmful enough to establish a constitutional violation, or that defendant acted with a sufficiently
21 culpable state of mind, defendant is entitled to summary judgment.

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01 CONCLUSION

02 Based on the foregoing, this Court recommends that defendant's motion for summary
03 judgment be granted. This Court further recommends that plaintiff's complaint, and this action,
04 be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

05 DATED this 29th day of September, 2008.

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07 Mary Alice Theiler
08 United States Magistrate Judge
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